No. 16165.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

SECURITY-FIRST NATIONAL BANK,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S ANSWERING BRIEF.

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Statement of the Case.

The pertinent facts found by the Court below were stipulated to by the parties. Appellant's statement of the case (Op. Br. pp. 2-4) while not necessarily inaccurate, contains some statements not to be found in the stipulation of facts, nor in the Court's findings, and are not particularly pertinent to this case. We therefore summarize the pertinent facts of the case.

About the year 1949 and prior thereto, a fraudulent scheme to defraud the Government was entered into by Arthur H. Lange, Aline Lange Lee, a real estate broker of Los Angeles, her son and other members of her family [R. 28]. In pursuance of this scheme said persons prepared false and fictitious "W-2" forms concerning salary and income tax withheld, listing alleged employers, and at-

tached said forms to income tax returns which were then filed in their respective assumed and fictitious names [R. 28].[1] These persons did not use their own names but used in all instances fictitious or assumed names and showed addresses therefor [R. 28]. The tax returns, with the withholding forms attached, were in each instance fraudulently prepared to indicate that a refund on income tax was due and payable to the person filing same, under his fictitious and assumed name [R. 28]. The District Director of Internal Revenue, with whom said returns and forms were filed, upon receipt of same ordered payment of the refunds to the fictitiously named persons who had filed the returns [R. 28-29]. The District Director ordered the payment of said refunds without first checking or making any investigation of his records with respect to any of said tax returns or withholding statements to ascertain whether or not the taxes fraudulently represented as having been paid had in fact been paid, or ascertaining any other facts with respect thereto [R. 28-29]. Pursuant to said District Director's said order, the refund checks were drawn and made payable to and were mailed to the respective persons, in their fictitious and assumed names, appearing on and who had signed the tax returns and withholding statements at the addresses shown on the returns [R. 29].

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[1]The court found that the Internal Revenue Laws of the United States at the time involved in this case and at present provide that, employees shall receive at the end of each calendar year "W-2" forms from each employer, indicating thereon the amount of income paid by the employer to the employee, the amount of Social Security withheld, and the amount of income tax withheld, and at the end of each calendar year on or before the filing date for income tax returns the employee prepares an income tax return attaching thereto copies of said "W-2" form. That in the event the amount of income tax withheld during the calendar year exceeds the amount of income tax due and owing by the employee the employee indicates that the money shall either be applied to the ensuing year's income tax or be refunded to the employee [R. 27-28].

There are involved herein fifty-eight such checks, aggregating $9,719.15 [R. 29]. Each of said checks so issued and delivered was endorsed by the person who signed the tax return showing the over-payment, to cover which the check was issued to said person in his fictitious and assumed name [R. 29]. Said checks were negotiated and in the course of business were received and cashed by defendant bank [R. 29]. Thereafter, in the normal course of business, defendant bank endorsed said checks with the statement thereon "All prior endorsements guaranteed" and presented same for payment and they were paid by the Government's fiscal agent [R. 29]. Upon discovery that a fraud had been committed plaintiff notified defendant thereof as to all checks involved herein, and demanded repayment in the amount of $9,719.15, which defendant bank has refused to make [R. 29-30]. The District Court gave judgment for defendant bank, holding that defendant was not liable on its guaranty of all prior endorsements as such prior endorsements were not forgeries as claimed by plaintiff [R. 30-31].

Summary of Argument.

As aptly stated in an analogous case involving the precise issue presented herein, "The real question here is whether these signatures are forgeries or mere steps in a fraud." (*United States v. Continental-American Bank & Trust Co.,* 175 F. 2d 271 (C. A. 5, 1949), cert. den. 338 U. S. 870. This is the issue presented for this Court's determination.

In holding the endorsements involved in this case were *not* forgeries, the court below correctly applied the impostor rule, a universally accepted rule both as a matter of federal and state law. The facts of this case present a classic case for the application of the impostor rule.

In Point I, we discuss the particular facts necessary for an application of the impostor rule and show why in this case its application, as a matter of federal law, is clear. We also will show that the policy underlying the law of negotiable instruments demands the application of the impostor rule to the facts of this and analogous cases and that the Government is not one privileged to defeat that policy.

In Point II we address ourselves to appellant's argument, the burden of which is premised upon a basic but erroneous assumption that this is a forgery case. The Government refuses to recognize the difference between a forger and an impostor and persists in its assumption that the endorsements involved in this case are forgeries. The Government, in erroneously assuming the very issue presented, thus begs the entire issue when it argues that the Government should not in this case be precluded from setting up the *forgery* (Op. Br. pp. 6-9, 29-30, 46-47). Its argument is misplaced. In support of its argument the Government relies on the *National Metropolitan*[2] and other related forgery cases. We will demonstrate the irrelevancy of these cases to the case at bar primarily on the basis of the legal issues raised and determined in those cases and the complete absence therein of any mention whatsoever of the impostor rule which is applicable herein. We will demonstrate further that the United States Supreme Court has already on two separate occasions accepted the application of the impostor rule, as a matter of federal law, in two cases indistinguishable from the case at bar, and that the Court by its action has in effect held the *National Metropolitan* and other related forgery cases

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[2]*National Metropolitan Bank v. United States*, 323 U. S. 454 (1945).

wholly inapplicable to a case such as the one at bar.[3] In addition we will show that the cases relied upon by the Government, aside from the fact that the issues determined therein have no bearing on this case, are readily distinguishable on their facts from this case.

ARGUMENT.

I.

The Endorsements Were Not Forgeries; the District Court Correctly Held Appellee Was Not Liable Under Its Guarantee of Prior Endorsements.

As indicated in the Summary of the Argument, if the endorsements in question are not forgeries,[4] the Government cannot prevail. Under federal law the endorsements were not forgeries.

Preliminary to a detailed discussion, it is well that four well settled propositions under federal law be stated:

First, the rule governing the rights and liabilities of the Government on negotiable paper are to be determined by federal courts through reference to federal rather than local law. (*Clearfield Trust Co. v. United States,* 318 U. S. 363, 87 L. Ed. 838 (1943); *National Met. Bank v. United States,* 323 U. S. 454, 89 L. Ed. 383 (1945).)

Secondly, the United States is not a privileged suiter, its rights and liabilities being identical with those of a private individual under the same circumstances. (*United States v. National Exchange Bank of Baltimore,* 270 U. S. 527,

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[3]See Point II, A, pp. 19-23, *infra.*

[4]Forgery as involved herein is to be distinguished from forgery in its popular sense. See *Atlantic Natl. Bank of Jacksonville v. United States,* 250 F. 2d 114, 119 (C. A. 5, 1957); *Pennsylvania Co. etc. v. Fed. Reserve Bank,* 30 Fed. Supp. 982, 985 (D. C. Pa., 1939).

70 L. Ed. 717 (1926); *Clearfield Trust Co. v. United States, supra.*)

Third, the impostor rule should be applied to commercial paper issued by the federal government in those circumstances where it would be applied had the paper been issued by a private individual.[5] (See *United States v. Union Trust Co.,* 139 Fed. Supp. 819 (D. C. Md., 1956) and cases collected at p. 825.)

Fourth, there is no distinction made between the effect to be given an impersonation by mail and one in person; the impostor who conducts fraudulent negotiations by mail similarly gets title to the instrument thus fraudulently obtained. (See *Atlantic Natl. Bank of Jacksonville v. United States,* 250 F. 2d 114, 117 (C. A. 5, 1957); *Security-First National Bank v. United States,* 103 F. 2d 188, 190 (C. A. 9, 1939); *United States v. Union Trust Co.,* 139 Fed. Supp. 819, 825 (D. C. Md., 1956); *Hartford Acc. & Ind. Co. v. Middletown Natl. Bank,* 126 Conn. 179, 10 A. 2d 604, 607-608 (1939); *Britton on Bills and Notes* (1943), pp. 715-725; Beutels Brannan, *Negotiable Instruments Law* (7th Ed), pp. 470-480; 20 *Words and Phrases,* 97, impostor rule.)

A. The Imposter Rule and Its Application to This Case.

The impostor rule has been often stated, but as accurate a brief statement of the rule as we have found is quoted in the opinion of the court in *Atlantic Natl. Bank of Jacksonville v. United States,* 250 F. 2d 114, 118 (C. A. 5, 1957), as follows:

> " '. . . where the drawer of a check *has dealings* with an impostor who assumes a false name, and the

[5]The Government, of course, concedes that the impostor rule may be applied to Government paper (Op. Br. 28).

> check *is intended* for the person with whom the *drawer is dealing,* payment of the check by the bank to such impostor or on his endorsement will be *authorized* and *binding* upon the . . .' drawer, 7 Amer. Jur., Banks, Sec. 599." (Italics ours.)[6]

The italicized portion of this statement of the rule emphasizes those particular facts which makes this and analogous cases call for the application of the impostor rule. Those facts paint in every such case a requisite picture, the essentials of which are (1) fraud practiced on the drawer by an impostor which induces the drawer to deal with same, (2) such dealing is consummated by the issuance and delivery of a check by the drawer, (3) the check is *intended* for the impostor, in his assumed name, with whom the drawer has been dealing, and the check is *intended to be paid on his endorsement.* (See *Cohen v. Lincoln Sav. Bank,* 275 N. Y. 399, 10 N. E. 2d 457, 461 (1937).) The facts in the case at bar meet these requisites. By virtue of the antecedent fraud practiced on the Government by the impostors (the filing of fraudulent tax returns with fictitious "W-2" forms attached in their assumed and fictitious names), the Government was convinced it was dealing with valid claimants entitled to tax refunds, which in due course induced and resulted in the Government issuing and delivering the checks in question *intended* for the impostors, in their assumed and fictitious names, and obviously issued and delivered with the *intent* that such checks should be paid on their respective endorsements. (Statement of the case, pp. 1-3, *supra.*) That being the clear intent of

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[6]See, also, *Hartford Acc. & Ind. Co. v. Middletown Nat. Bank,* 126 Conn. 179, 10 A. 2d 604, 606 (1939), quoting with approval this same statement of the rule.

the Government, under any true test these endorsements were not forgeries. (*United States v. Continental-American Bank & Tr. Co.,* 175 F. 2d 271, 272 (C. A. 5, 1949), cert. den. 338 U. S. 870 (1949); *United States v. First Natl. Bank of Albuquerque,* 131 F. 2d 985 (C. A. 10, 1942), cert. den. 318 U. S. 774 (1943); *Fidelity & Dep. Co. of Md. v. Union Tr. Co.,* 129 F. 2d 1006 (C. A. 2, 1942); *United States v. First Natl. Bank of Prague,* 124 F. 2d 484 (C. A. 10, 1941); *Security-First National Bank v. United States of America,* 103 F. 2d 188 (C. A. 9, 1939); *United States v. Liberty Ins. Bank,* 26 F. 2d 493 (W. D. Ky., 1928); *United States v. Union Tr. Co.,* 139 Fed. Supp. 819 (D. C. Md., 1956); *Schweitzer v. Bank of America,* 42 Cal. App. 2d 536, 109 P. 2d 441 (1941); *Hartford Acc. & Indem. Co. v. Middletown Natl. Bank,* 126 Conn. 179, 10 A. 2d 604 (1939); *Cohen v. Lincoln Sav. Bank,* 275 N. Y. 399, 10 N. E. 2d 457 (1937); *Montgomery Garage Co. v. Mfrs. Liab. Ins. Co.,* 94 N. J. L. 152, 109 Atl. 296 (1920); *Land Title & Tr. Co. v. Northwestern Natl. Bank,* 196 Pa. 230, 46 Atl. 420 (1900); *Anno.* 112 A. L. R. 1435.) Notwithstanding the fact that application of the impostor rule depends upon whether or not the drawer's *intent* was carried out[7] the Government summarily dismisses this as an unsatisfactory reason for applying the rule. It claims that the drawer's intent is in every impostor case an "unrealistic" test because it is "artificial and arbitrary." (Op. Br. pp. 30-33, 41.)[8]

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[7]See cases cited immediately above. Compare *Fulton National Bank of Atlanta v. United States,* 107 F. 2d 86, 87-88 (C. C. A. 5, 1939), a true forgery case.

[8]While the cases sometimes state that the drawer may be said to have a dual intent, first, that he intends to make the instrument payable to the person before him or to the person writing at the other end of the line, in case the negotiation is by correspondence, and

The Government's intention however to deal with the impostors in this case is clear; it is neither artificial, arbitrary nor unrealistic. As the checks in question were obviously intended for persons, not names, the intention of the Government as drawer cannot depend upon the actual existence or nonexistence of the person of the name inserted in the instrument as payee. (*Hartford Acc. & Indemn. Co. v. Middletown Natl. Bank,* 126 Conn. 179, 10 A. 2d 604, 606, 608 (1939).) Any of the impostors could have "assumed the name of Marco Polo with the same results to the bank," (*Schweitzer v. Bank of Amer.,* 42 Cal. App. 2d 536, 109 P. 2d 441 (1941), at p. 541 of 42 Cal. App. 2d) instead of the particular fictitious names

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second, that he intends to make the instrument payable to the person whom he believes the stranger to be, "Nevertheless an examination of the cases in other jurisdictions can leave no doubt that, as Brannan points out, in most jurisdictions it has been held that the first is the controlling intent (citations)" *Cohen v. Lincoln Sav. Bank,* 275 N. Y. 399, 10 N. E. 2d 457 (1937), at page 461 of 10 N. E. 2d. See, also *Security-First National Bank v. United States,* 103 Fed. 188 (C. A. 9, 1939) ; *Montgomery Garage Co. v. Mfrs. Liab. Ins. Co.,* 94 N. J. L. 152, 109 Atl. 296 (1920). The Court in the *Cohen* case, *supra,* went on to say, "It was the finding of this *first intent* which has dictated the conclusion in *every case* where a bank has been exonerated of fault in judgment of a negotiable instrument to a person not named in the instrument." (10 N. E. 2d at p. 461). It is to be noted that under the facts presented by the instant case the drawer can be said to have but *one* intent; that is to say, the so-called dual intent referred to above and present in many impostor cases (*i.e.,* where the impersonation is of a living or existent person whom the drawer may be said to have in mind and whom he believes the impersonator to be) is not present in this case where the drawer is dealing with an impostor, under an assumed and fictitious name. Thus the stranger, to whom he makes the instrument payable, is the person writing at the other end of the line and is the same person he, in fact, believes the stranger to be. It follows, therefore, that there cannot be in this situation anything arbitrary or unrealistic in adhering to the test of the drawer's intent in applying the impostor rule as there is no necessity even that a choice of two possible intents be made. Thus, this is the strongest possible case for the application of the impostor rule. See Note 21, pp. 20-21, *infra.*

they in fact assumed. Appellant concedes this. (Op. Br. p. 27, N. 13.) And, of course, the impostors with whom the Government actually dealt in this case were *actual* persons.[9] [R. 28.] The checks were issued and delivered by the Government to the impostors, in their assumed and fictitious names, solely to consummate the dealing or transaction between them and for no other reason.[10] (See *Cohen v. Lincoln Sav. Bank,* 275 N. Y. 399, 10 N. E. 2d 457, 461 (1937).) It cannot, we submit, be seriously argued that the Government in this case dealt with the impostors on any basis other than actual persons *believed* to be valid claimants entitled to tax refunds [Findings of Fact, R. 28-29; *cf. Land Title & Tr. Co. v. Northwestern Natl. Bank,* 196 Pa. 230, 46 Atl. 420, 422 (1900)], and that on this basis they issued and delivered refund checks *intended* for the impostors and necessarily with the *intent* that such checks would be paid on their endorsements. (*United States v. First Natl. Bank of Albuquerque,* 131 F. 2d 985, 988 (C. A. 10, 1942), cert. den. 318 U. S. 774 (1943).)

It was stipulated and found as a fact in the District Court that "each of the checks was endorsed by the

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[9]See *Fidelity & Dep. Co. of Md. v. Union Tr. Co.,* 129 F. 2d 1006, 1009 (C. A. 2, 1942), affirming 37 Fed. Supp. 3 (C. C. N. Y., 1941); *United States v. Union Trust Co.,* 139 Fed. Supp. 819, 824 (D. C. Md., 1956); *Hartford Accident & Ind. Co. v. Middletown Natl. Bank,* 126 Conn. 179, 10 A. 2d 604, 607 (1939).

[10]When the Government issued the checks there was no mistake of fact except the mistake which the Government made when it issued the checks, and the loss is due, not to the bank's error in failing to carry out the Government's intention, but primarily to the Government's own error, into which it was led by the deception previously practiced upon it. See *Hartford Acc. & Indem. Co. v. Middletown Natl. Bank,* 126 Conn. 179, 10 A. 2d 604, 606 (1939); and see *United States v. Union Tr. Co.,* 139 Fed. Supp. 819 (D. C. Md., 1956); *United States v. Continental-American Bank & Trust Co.,* 175 F. 2d 271 (C. A. 5, 1949), cert. den. 338 U. S. 870 (1949).

person who had signed the tax return on the basis of which the refund check was issued" [R. 23-24, 29]. Thus, as to each check the endorsement placed upon it was the endorsement of the very person with whom the Government had been dealing, under his assumed and fictitious name, and for whom the check was by the Government intended. (Compare *United States v. Liberty Ins. Bank,* 26 F. 2d 493, 494 (W. D. Ky., 1928).) In this posture the actual intent of the Government to deal with the impostors has not only been objectively manifested by the fact of the issuance and delivery of the checks, but that actual intent is conclusively established by the circumstances attending and inducing the issuance and delivery of the checks.[11] The existence of this intent is implicit if not express in the findings made below [R. 28-29]. This actual intent being established, appellee has simply paid money on the strength of the persons' endorsement in each case for whom the money was intended

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[11]The Court in *Cohen v. Lincoln Sav. Bank, supra,* 10 N. E. 2d at p. 461, really got to the crux of the matter when, speaking of the drawer's dominant or controlling intent as being the majority rule or test adhered to in applying the impostor rule, it said:

> "It is sufficient to point out that even in those cases which apply to so-called 'majority rule' there was proof of an antecedent fraud by which a stranger induced a person to deal with him by masquerading as another and the negotiable instrument was made payable to the impostor as a result of the antecedent fraud and the negotiations induced thereby; and it appeared that the instrument was delivered to consummate the dealings with the stranger and with intent that it should be paid to him . . ."

In short the dominant or controlling intent exists *as a matter of law* when the circumstances attending the issuance and delivery of the checks establish as facts a prior dealing between the drawer and some actual impersonator, fraudulently induced, and such dealing is consummated by issuance and delivery of the checks intended for that very person with whom the Government had been dealing. See Anno. 112 A. L. R. 1435, 1437.

(*Cohen v. Lincoln Savings Bank, supra,* at p. 461 of 10 N. E. 2d) and perforce the endorsements were *genuine.* (*United States v. First Natl. Bank of Albuquerque, supra,* 131 F. 2d at 987, and cases cited, p. 8, *supra.*) Whatever might be said with respect to the drawer's intent in the case of an employee who, alone, is in a position to and does defraud his master[12] under the facts of this and analogous cases nothing is left to "metaphysical speculation" (Op. Br. p. 32) as to what the Government's actual intent was. It is an undisputable fact.

The drawer's intention to deal with the impostors and to pay the checks upon their endorsements can not, of course, depend upon the fact the Government was induced by fraud to deal with the impostors[13] any more than such intent cannot depend upon the existence or non-existence of a person of the name designated in the instrument as the payee (see p. 9, *supra*).

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[12]See *Hartford Acc. & Indem. Co. v. Middletown Natl. Bank,* 126 Conn. 179, 10 A. 2d 604, 607 (1939); *Fidelity & Dep. Co. of Md. v. Union Trust Co.,* 37 Fed. Supp. 3, 5-6, aff. 129 F. 2d 1006, 1009 (C. A. 2, 1942); and compare the facts in *Nat. Met. Bank v. United States,* 323 U. S. 454 (1945); *Wash. Loan & Tr. Co. v. United States,* 134 F. 2d 59 (C. A. D. C., 1943); see Point II, B, pp. 24-25, *infra.*

[13]This is a case no different in principle from the situation where the execution of a contract is fraudulently induced and thus voidable by the party on whom the fraud was practiced, but only so until the rights of innocent third parties intervene. Until voided there is a valid and subsisting contract though fraudulently induced. Where, of course, negotiable instruments are concerned the root of the policy underlying such instruments is to explicitly protect innocent third parties or holders in due course, in the parlance of the law merchant, in the absence of which negotiability would be destroyed. Appellee is without question a "holder in due course" under the pertinent provisions of the Negotiable Instruments Law. A holder in due course is defined *inter alia* as a holder who "at the time (the instrument) was negotiated to him . . . had no notice of any . . . defect in the title of the person negotiating (the instrument)" (Negotiable Instruments Law, Section 52.) "To constitute

Appellants suggest as a test that there should be no necessity to look beyond the face of the instrument for the purpose of ascertaining the drawer's intent; they also advert to the fact that equitable considerations are discussed in various opinions in the impostor cases (Op. Br. pp. 31, 33). We fail to see how either of these statements aids their cause or how such can turn this, a clear impostor case, into a forgery case. Rather such statements completely beg the issue. The court in the *Cohen* case,[14] said, with respect to what appears by the instrument, "only in that way can merchants rely upon the rule that a negotiable instrument in the hands of an innocent purchaser will be paid according to its tenor and *intent* and will not be paid otherwise." (Emphasis added; 10 N. E. 2d at p. 463.) We submit that what appears within the confines of the four corners of these checks are the *genuine* endorsements of the intended payees. What signatures might these endorsements be compared with so that it could, under this test, be determined otherwise? Under this test how would appellant show the endorsements as

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notice of . . . defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the . . . defect or knowledge of such facts that his action in taking the instrument amounted to bad faith." (Negotiable Instruments Law, Section 56.) It is clear of course that appellee had no notice of any defect in the title of the persons who negotiated the checks in question to appellee. [Stipulation of Facts, R. 21-25; Findings of Fact, R. 26-30.] Fraud *in the inducement* by which each impostor herein obtained a check from the Government [Statement of the Case, pp. 1-2, *supra;* Findings of Fact, *supra,* R. 26-30] rendered his title to the check defective (Negotiable Instruments Law, Section 55); but such constitutes only a personal defense available to the drawer against the impostor—payee and is of *no avail* against appellee, a holder in due course, who "holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and (who) may enforce payment of the instrument for the full amount thereof against all parties liable thereon." (Negotiable Instruments Law, Section 57.)

[14]275 N. Y. 399, 10 N. E. 2d 457 (1937).

forgeries? As to appellant's other suggestion, until *forgery* is established with respect to these endorsements the equities inherent and in favor of appellee only provide added strings to the bow. These suggestions, we submit, only point up the lack of merit in appellant's argument.

Appellant advances a lengthy argument (Op. Br. pp. 33-47) to the effect that in their view the impostor rule has been actually applied only where either (1) the casher has upon inquiry of the drawer been advised to pay the impostor; or (2) the impostor would have been identified as the payee by the drawer if inquiry had been made by the casher. In the first situation appellant says "The drawer is clearly precluded from asserting forgeries" (Op. Br. p. 38). In the second situation they say, "It is much less speculative to assume that the drawer would have identified the impostor as the payee for the casher" than to ascertain the drawer's actual or subjective intent because such is "artificial and arbitrary" (Op. Br. p. 41).

Aside from the fact that in this case the drawer's actual intent is an established fact, as a matter of law, and is neither artificial nor arbitrary (see pp. 8-12, *supra*), appellant's cases do not substantiate that their reasoning has ever been the basis for the application of the impostor rule in any case. In no case we have read has it even been hinted that a requisite or condition for the application of the impostor rule was either of the foregoing circumstances to which appellant alludes. This is of course not surprising because appellant's argument erroneously *assumes* that the endorsements were forgeries (the sole issue at bar) and from this false assumption they proceed to argue that under the facts of this case the drawer

should not be "precluded from asserting forgeries" (Op. Br. p. 38). As a matter of Federal law, whether an endorsement is a forgery is *not* the same question as whether or not a drawer will be precluded from asserting a forgery, appellant's protestations to the contrary notwithstanding. (*United States v. First Natl. Bank of Albuquerque, supra,* 131 F. 2d at 977 and cases cited p. 8, *supra.*)

Furthermore what transpires between the drawer and the casher or what *might have transpired* (Op. Br. pp. 39-42) can have no effect of itself on the question of whether or not the casher has fulfilled his contract of guaranty. Of course, some affirmative act by the drawer may work an estoppel against him even if the contract was not fulfilled as in a forgery case. This is the situation to which Section 23 of the Negotiable Instruments Law[15] is addressed. But the crux of the matter herein surrounds that point in time when occurs the issuance and delivery of the checks and the intention of the drawer at that time. Thus, what may or *may not* take place thereafter cannot be relevant to nor change the prior circumstances under which the checks were issued and delivered, which circumstances are determinative of the issue herein.

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[15]Section 23 of the Negotiable Instruments Law is as follows:

"*Sec. 23 (Forged Signature; Effect of.)* When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority."

B. The Policy Behind the Impostor Rule and the Law of Negotiable Instruments Generally Strongly Support the Application of the Impostor Rule to the Facts of This Case.

Appellant argues (Op. Br. pp. 22-27) that the policy of the *National Metropolitan* case renders that case controlling herein. Aside from the fact the *National Metropolitan* case is wholly inapplicable both in principle and on its facts (see Point II, pp. 18-25, *infra*), we submit the policies behind the impostor rule and the law of negotiable instruments generally are parallel and that the latter policy can be only served in cases such as the one at bar by applying the impostor rule.

The cases applying the impostor rule have repeatedly pointed out that to not apply the rule would destroy the free circulation and negotiability of Government commercial paper. (See *United States v. Continental-American Bank & Tr. Co.,* 175 F. 2d 271, 272 (C. A. 5, 1949), cert. den. 338 U. S. 870 (1949); *United States v. First Natl. Bank of Albuquerque,* 131 F. 2d 985, 989 (C. A. 10, 1942), cert. den. 318 U. S. 774 (1943); *United States v. Union Tr. Co.,* 139 Fed. Supp. 819, 923 (D. C. Md., 1956). See also *Atlantic Natl. Bank of Jacksonville v. United States,* 250 F. 2d 114, 118 (C. A. 5, 1957); *Dartmouth Natl. Bank of Hanover v. Keene Natl. Bank,* 99 N. H. 458, 115 A. 2d 316, 318, 319 (1955); and see Point I, A, pp. 12-13, *supra.*) The policy of free negotiability of Government paper was clearly not rejected in the *National Metropolitan* case as a valid policy criterion in support of the application of the impostor rule (*cf.* Op. Br. pp. 34-35). That case is not pertinent to this or factually analogous cases as the impostor rule was not even raised or discussed. (See Point II, A, p. 19, *infra.*) Furthermore, it has been pointed out by the Supreme Court that

the Government is not a privileged suitor, but its rights are identical to those of private individuals. (See Point I, pp. 5-6, *supra.*) The Court in so holding recognized that "to perform adequately its basic function such paper must be freely transferable. . . ." (*United States v. Union Trust Co., supra,* 139 Fed. Supp. 823.) The Government "does business on business terms . . . [and] is not excepted from the general rule by the largeness of its dealings and its having to employe agents. . . ." (*United States v. Natl. Exch. Bank,* 270 U. S. 527, 534-535, 70 L. Ed. 717, 718 (1926); *Clearfield Tr. Co. v. United States,* 318 U. S. 363, 369, 87 L. Ed. 838, 843 (1943).)[16] Its responsibility being no more and no less than that of any other drawer the free circulation of its paper should obviously not be impeded where other commercial paper is not by placing upon banks unreasonable burdens against which, as a practical matter, they cannot protect themselves short of a complete embargo on Government paper. (*United States v. Continental-American Bank & Tr. Co., supra,* 175 F. 2d at p. 118.) The Government admits that they, as a practical matter, can do nothing to ease the situation of the banks with respect to its commercial paper even if called upon to do so.[17] The plain fact is the Government is asking this Court to hold that appellee

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[16]The Government, however, begs this court to except it from its responsibilities because of the large volume of its dealings with respect to tax refunds notwithstanding the clear admonition by the United States Supreme Court above that it will not be so excused. See Op. Br. Note 10, p. 25.

[17]"If the disbursing agent had been asked to identify the physical person claiming to be one of the named payees he would have been unable to do so inasmuch as his knowledge about the payee was limited to the information that appeared on the fraudulent tax return—namely, the payee's name and address as it appeared on the face of the check and also the name and address of the supposed employer. [R. 28-29, R. 20.]" (Op. Br. 26.)

guarantee that Government checks are honestly procured in addition to their present guaranty that the person to whom the check was issued endorsed it. This is indeed a novel suggestion. But such is not any part of the bank's contract. (See *United States v. Continental-American Bank & Tr. Co., supra,* 175 F. 2d at p. 272 and other cases cited, p. 8, *supra*); rather it is expressly part of the *drawer's* contract who "by drawing the instrument *admits* the existence of the *payee* and his then *capacity to endorse;* and *engages* that on due presentment the instrument will be accepted or paid, or both, according to its tenor. . . ." (Negotiable Instruments Law, Sec. 61.) (Emphasis added.)

II.

The Decisions in the National Metropolitan and Related Cases Relied Upon by the Government Are Not Pertinent to This Case Neither in Principle nor on Their Facts.

A. The Principles of the National Metropolitan and Related Cases Are Not Pertinent to the Case at Bar and Analogous Cases.

The Government in its persistent refusal to recognize the difference between a forger and an impostor, relies heavily upon the decision in *National Metropolitan Bank v. United States,* 323 U. S. 454 (1945) (Op. Br. pp. 12-27, 45-47). The Supreme Court however admonished in unmistakable terms the scope of its holding in that case:

> "We do hold that negligence of a drawer-drawee in failing to discover fraud prior to a guaranty of the genuineness of prior endorsements does not absolve the guarantor from liability in cases *where the prior endorsements have been forged.*" (323 U. S. at p. 459.) (Emphasis added.)

The Court's decision was clearly premised on the fact of forged endorsements. Furthermore the cases expressly drawn upon by the Court[18] in the *National Metropolitan* case were both clear forgery cases. That all these cases were forgery cases and thus wholly inapplicable to an impostor case has been patiently pointed out on several occasions by the Fifth Circuit. (See *Atlantic National Bank of Jacksonville v. United States,* 250 F. 2d 114, 118 (C. A. 5, 1957); *United States v. Continental-American Bank & Tr. Co.,* 175 F. 2d 271, 272 (C. A. 5, 1949), cert. den. 338 U. S. 870 (1949); see also, *United States v. Union Trust Co.,* 139 Fed. Supp. 819, 823-824 (D. C. Md., 1956).) It was equally pointed out by the court that in all the Government cases above referred to the impostor rule was not even raised let alone mentioned or discussed. This is not surprising for the obvious reason that a forgery case and an impostor case are inherently mutually exclusive of one another. The *National Metropolitan* and related cases, being cases premised on the fact of forged endorsements, cannot have any bearing whatever on this case which we have demonstrated to be a classic case for the application of the impostor rule (see Point I, A, pp. 6-15, *supra*). Furthermore, the United State Supreme Court has on two occasions made this very clear.

The Supreme Court of the United States decided the *National Metropolitan* case in 1945. Prior thereto, in 1943, the Court denied a writ of certiorari in *United States v. First Natl. Bank of Albuquerque, supra.*[19] Subsequent

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[18]*United States v. Natl. Exch. Bank of Providence,* 214 U. S. 302 (1909); *Clearfield Trust Co. v. United States,* 318 U. S. 363 (1943).

[19]131 F. 2d 985 (C. A. 10, 1942), cert. den. 318 U. S. 774, denial by the Court of writ of certiorari in this case occurred 14 days after the Court rendered its decision in *Clearfield Trust Co. v. United States,* 318 U. S. 363 (1943).

to its decision in the *National Metropolitan* case, the Court in 1949 denied a writ of certiorari in *United States v. Continental-American Bank & Tr. Co., supra.*[20] On both appeals in the *Continental-American Bank* case and on the appeal in the *First Natl. Bank of Albuquerque* case the impostor rule was applied by the Appellate Courts and the loss placed on the Government. The "particular facts" of these cases[21] painted a picture indistinguishable from the case at bar.

In both *Continental-American Bank* cases the Government strenuously argued that the *National Metropolitan*

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[20]175 F. 2d 271 (C. A. 5, 1949), cert. den. 338 U. S. 870; same case on prior appeal to Fifth Circuit, 161 F. 2d 935 (C. A. 5, 1942).

[21]See Point I, A, p. 7, *supra.* Brief summaries of the particular facts of these two cases are as follows:

In *First National Bank of Albuquerque* the veterans bureau issued to Harry T. Goulding, a World War veteran, an adjusted service certificate pursuant to the World War Adjusted Compensation Act. By some means Harry Wesley Ott got possession of said certificate and representing himself to be Harry T. Goulding presented the certificate together with a loan application to the veterans bureau. As required by prescribed forms and regulations Ott had previously secured an identification of himself as Harry T. Goulding from a notary public. The veterans facility consummated the loan and issued a check payable to the order of Harry T. Goulding and delivered same by mail addressed to Harry T. Goulding at a hotel where Ott was registered under said name. Ott presented the check to the First National Bank of Albuquerque for payment and the bank cashed the check and delivered the proceeds on the endorsement of Harry T. Goulding after some checking was done as to Ott's assumed identity. The bank endorsed the check "Prior endorsements guaranteed" and it was negotiated and eventually paid by a branch of the Federal Reserve. Thereafter the Government discovered the fraud and demanded reclamation from the bank which was refused. The trial court applied the impostor rule and the Government appealed (131 F. 2d at pp. 986-987).

In *United States v. Continental-American Bank & Trust Company* one Bertha Smith assumed the name of Beulah Mitchell Gibbs, the widow of a deceased soldier, and impersonating said widow through applications and affidavits in correspondence with the Vet-

case controlled, indeed, on the second appeal of that case[22] that the prior decision was wholly inconsistent and contrary to the decision in the *National Metropolitan* case and the cases relied on therein.[23] The Fifth Circuit held in both instances that the *National Metropolitan* case and the cases relied on therein were not only not controlling, but were not pertinent involving as they did common forgeries, not impostors. Similarly in the *First National Bank of Albuquerque* case the Government asserted that the transaction there, as a matter of federal law, should

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erans Administration secured therefrom allowances as said widow in pursuance of which a series of checks were issued and delivered by the Veterans Administration to her. She endorsed said checks in her assumed name of Beulah Mitchell Gibbs and the bank assuming her so to be cashed the same. The defendant banks endorsed the checks "Prior endorsements guaranteed", and they were paid by the Federal Reserve Bank. The trial court applied the impostor rule and the Government appealed (175 F. 2d at pp. 271-272).

In both these cases, as in the case at bar, the Government was deceived into dealing with an actual impostor under an assumed name, who was believed to be a valid claimant, and in consummation of said dealing issued and delivered checks intended for the very person with whom it had dealt and with the intent that such checks be paid on their endorsements. The only factual difference between these two cases and the case at bar is that in those two cases the name assumed by the impostors was the name of an actual person with a valid claim against the Government, while in the case at bar the name assumed was a fictitious name. But as we have pointed out, the existence or non-existence of a person of a name assumed and designated in the instrument as the payee cannot have any bearing on the drawer's intent. See Point I-A, pp. 9, 12, *supra*. This factual difference is thus wholly immaterial in the determination of the issue herein in the same manner as it is immaterial whether the dealings are carried on in person or by correspondence. See Point I, p. 6, *supra*. Furthermore, as only one intent can reasonably be ascribed to the Government in this case as opposed to a dual intent present in many impostor situations, this case is an even stronger case on its facts than are the two cases above for the application of the impostor rule. See Note 8 at pp. 8-9, *supra*.

[22]See Note 20, p. 20, *supra*.

[23]See 175 F. 2d at p. 271.

be held a forgery, relying on *United States v. National Exchange Bank of Providence,* 214 U. S. 302 (1909).[24] This was also one of the cases relied upon by the Government in both *Continental-American Bank* cases, *supra.*

Of paramount significance however is the fact that in its petitions in the *First National Bank of Albuquerque* case and in the later *Continental-American Bank* case for a writ of certiorari the Government expressly based its application for the writ, in both instances, on the sole ground that the impostor rule had been erroneously applied and the decision sought to be reviewed was inconsistent and contrary to the forgery cases urged by the Government to be controlling;[25] in the *Continental-American Bank* case, that the decision was inconsistent and contrary to the Court's decision in the *National Metropolitan* case argued

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[24]See 131 F. 2d at p. 988.

[25]We have had examined the Government's petitions for writ of certiorari in both cases appearing above. In the case of *United States v. First Natl. Bank of Albuquerque,* in which certiorari was denied, the Government's statement of the question was as follows: "Respondent, the presenting Bank, received payments from the United States on a check which had been issued as a loan on a veteran's adjusted service certificate, and upon which the payee's endorsement was forged. Respondent guaranteed prior endorsements. Does the so-called impostor rule apply to prevent recovery by the United States?" It was pointed out in opposition to the petition of the Government that the statement that the endorsement was forged was begging the question and inaccurate. Under reasons for granting the writ of certiorari the Government pointed out that there was a conflict with the *National Exchange Bank of Providence* case in the Supreme Court and also with a number of Court of Appeals cases including the case of *District Natl. Bank v. Washington Loan & Tr. Co.,* 65 F. 2d 831 (C. A. D. C. 1933). In the opposition it was brought out that the *National Exchange Bank of Providence* case was a forgery case and had no application to the case at bar.

to be controlling.[26] By the Court's action in denying writs of certiorari on both these occasions, and particularly with respect to the later *Continental-American Bank* case, it is beyond serious argument that the Supreme Court in those cases accepted as a matter of federal law the application of the impostor rule thereto and necessarily with respect to analogous cases such as the one at bar; and further that application of the impostor rule in such cases is wholly consistent with the principle of the *National Metropolitan* and other related forgery cases which are perforce inapplicable thereto. No other construction of the Court's actions is tenable. (Compare Appellant's Statement, Op. Br., Note 15, p. 28.)

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[26]In *United States v. Continental-American Bank & Tr. Co.,* in which certiorari was denied, the question of the application of the impostor rule was definitely the primary question. Under the heading "Questions Presented" there appears the following:

> "3. Whether the so-called impostor rule can apply at all to a check issued by the United States."

The Government relied heavily on the *National Metropolitan Bank* case and as well on the *National Exchange Bank of Providence.* The Government, under the heading of "Reasons for Granting Writ of Certiorari" argued that (a) the Court refused to follow the controlling decisions of the Supreme Court in the *National Metropolitan Bank* and *National Exchange Bank of Providence* cases; (b) that the so-called impostor rule has no application in the case of government checks. In opposition it was pointed out that the impostor rule has become an established precedent in our jurisprudence regarding liability on the endorsing banks and distinguished the *National Metropolitan Bank* case as "a plain forgery and is therefore irrelevant to a consideration of the question, presented by the instant petition." To all of the above contentions urged so strenuously by the Government, the Supreme Court denied certiorari—an effective answer to the Government herein.

B. The National Metropolitan and Related Cases Are Distinguishable From the Case at Bar on Their Facts as Well as on Principle.

Aside from the fact that the principles of the *National Metropolitan* and related cases have no bearing on the case at bar, these cases relied upon so heavily by the Government are as well distinguishable on their facts in one very material respect. Most of the Government's cases, at least the important ones, involve the situation of an employee, who, alone, is in a position to, and does, perpetrate a fraud on his master—in most instances the Government.[27] In this fact situation the impostor rule, when applied, may perhaps be but a rationalization adopted to reach a desired result, but nonetheless a correct result. It may be true that in such cases it is not realistic to say that the checks were delivered by the Government to its own employee believing him to be the person whose name he had assumed, the name designated as the payee, and intending him to be the person on whose endorsement the checks would be paid.[28] It is perhaps somewhat difficult in the fraudulent employee case to attribute to the Government as an entity any actual or specific intent to deal with some actual person claiming under some name to be entitled to money from the Government, or that the

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[27]See *National Metropolitan Bank v. United States*, 323 U. S. 454, 89 L. Ed. 383; *Washington Loan & Trust Co. v. United States*, 134 F. 2d 59 (C. A. D. C., 1943). The facts of these cases are summarized in appellant's Opening Brief at pages 13-16.

[28]See *Fidelity & Deposit Co. of Md. v. Union Tr. Co.*, 129 F. 2d 1006, 1009 (C. A. 2, 1942), affirming 37 Fed. Supp. 3 (D. C. N. Y., 1941); *Hartford Acc. & Indem. Co. v. Middletown Natl. Bank*, 126 Conn. 179 (10 A. 2d 604, 1939), and *United States v. Union Tr. Co.*, 139 Fed. Supp. 819 (D. C. Md., 1956), which point up the importance of this factual difference between the type of case at bar and those relied upon by the Government involving a fraudulent employee with regard to the proper application of the impostor rule.

check issued is intended to be paid on any such person's endorsement—the Government official who issues the check obviously has not had any dealings in the matter except with his fellow servant of the Government to whom he delivers the checks. However, we do not suggest that it follows from the foregoing that in the fraudulent employee case the result is necessarily a forged endorsement. Although such a case is not the case at bar and we do not wish or intend here to argue a different case than is involved herein, we may suggest the endorsements in the employee situation should also be held to be genuine for the reason that the checks are *bearer* paper.[29]

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[29]In the fraudulent employee or "insider" situation the federal rule we have suggested above as being applicable thereto is not original with us, but has indeed been suggested in *Washington Loan & Tr. Co. v. United States,* 134 F. 2d 59, 63-64 (C. A. D. C., 1943), a case relied upon by the Government herein. The adoption of such a rule as the federal rule to govern the employee cases is, in effect, the adoption of Section 9(3) of the Negotiable Instruments Law *as amended,* which amended portion of said section has been expressly adopted by statute in at least seventeen states. The effect of Section 9(3), *as amended,* is that an instrument is bearer paper when an employee or agent has supplied the name of a payee, to the person making it payable, which name is fictitious or of a non-existent person, or with the same effect, the name of a living person not intended to have any interest therein; such instrument is then payable to the order of a fictitious or non-existing person and is bearer paper. Such is the operation of this section and perhaps supplies a better reason for reaching a correct result than is the case if the impostor rule is applied. For an excellent illustration of how this section, if adopted as the applicable federal rule in fraudulent employee situations would work, see *United States v. Bank of Amer.. NT&SA,* 47 Fed. Supp. 279, 280-281 (D. C. Cal. Dist. Ct., 1942). This particular case reached this result as a possible alternative ground for the decision under California law even before California expressly adopted the amendment to Section 9(3) of the Negotiable Instruments Law in 1945. (The 17 states referred to above as having adopted the amended version of Section 9(3) of the Negotiable Instruments Law are: Alabama, Arizona, Arkansas, California, Georgia, Idaho, Illinois, Louisiana, Massachusetts, Minnesota, Mississippi, Montana, New Mexico, North Carolina, Oregon, Utah and Wisconsin. See Statutory Material for Cases on Commercial and Investment Paper, 2d Ed., Roscoe Steffen, Professor of Law, University of Chicago, 1954, p. 7.

Conclusion.

To summarize the argument at this point would be to repeat the summary which preceded it. For the reasons which we have set forth the judgment of the Court below should be affirmed.

Respectfully submitted,

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